A

MOHD ZAIHAM MISLAN

v.

PP

B

FEDERAL COURT, PUTRAJAYA
AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-134-2008 (C)]

C

19 OCTOBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Admissibility of cautioned statement - Administration of caution - Prejudicial evidence of previous drug*

D

transaction - Whether alleged defects rendered statement inadmissible - Whether other available evidence more than sufficient to sustain conviction

CRIMINAL PROCEDURE: *Statements - Cautioned statements - Admissibility of - Administration of caution - Prejudicial evidence of*

E

previous drug transaction - Whether alleged defects rendered statement inadmissible

CRIMINAL PROCEDURE: *Trial - Failure to cross-examine prosecution witness on crucial issue - Whether amounted to acceptance of witness's testimony*

F

CRIMINAL PROCEDURE: *Conviction - Validity of conviction - Critical re-examination of evidence - Miscarriage of justice - Whether conviction safe*

G

EVIDENCE: *Statement - Cautioned statement - Admissibility of - Administration of caution - Prejudicial evidence of previous drug transaction - Whether alleged defects rendered statement inadmissible*

EVIDENCE: *Cross-examination - Defence counsel's failure to cross-examine prosecution witness - Whether amounted to acceptance of witness's*

H

testimony

The appellant, whose appeal to the Court of Appeal against his conviction and sentence to death under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') by the High Court for

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trafficking in cannabis was dismissed, filed the present appeal against the Court of Appeal's decision. The only ground argued by the appellant was that the trial judge erred in admitting the

appellant's cautioned statement ('P27'). The appellant contended that there were two major defects in the recording of P27: (i) the caution was merely read and not administered, in the sense that it was not explained together with its consequences. It was submitted that merely reading the caution to a person is a mechanical exercise and does not amount to administering the caution. It was further averred that although the recording officer ('SP9') said in his evidence that he had explained the caution to the appellant, not a word was mentioned in P27 itself about this. SP9's oral evidence should not have been admitted as it was a clear afterthought and it was very doubtful whether SP9 had in fact explained the caution. In any event, there was no evidence as to what was the nature of the explanation given by SP9; and (ii) P27 contained very prejudicial evidence of a previous drug dealing of the appellant which was evidence of bad character and reference was made to s. 54(1) of the Evidence Act 1950 ('EA'). It was contended that the trial judge could have been prejudiced in arriving at his decision in convicting the appellant as he had mentioned in his judgment about the appellant's previous drug dealing. It was thus submitted that the cautioned statement should be ruled inadmissible due to these defects. As the appellant's conviction was based on the cautioned statement, it should follow that the appeal be allowed and the appellant acquitted and discharged.

Held (dismissing the appeal)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) There is no statutory requirement under the law, be it the Criminal Procedure Code or the Act, that the caution administered by the recording officer to the accused person must be explained. The only essential requirement for the statement to be made admissible is that it must be voluntarily given and to arrive at that finding, the trial judge must assess all the facts and circumstances that surround the giving of the statement. In the present case, since the appellant and SP9 were Malays, the fact that the caution was administered, and the statement recorded, in the Malay language was a non-issue. It was recorded in P27 that the appellant had answered in the affirmative when asked whether he understood the caution and whether he still wanted to make a statement

A pertaining to the arrest since he understood the caution. The appellant also reaffirmed that he did not supply the statement under threat, promise or inducement. (paras 17, 18 & 19)

(2) SP9 had testified that he had explained the caution to the
B appellant although he had not recorded the explanation factor in the impugned statement. This part of SP9's evidence about him explaining the caution to the appellant was never challenged at any stage of the trial. This issue was only taken up by the appellant at the appellate stage. As SP9 had stated
C in evidence that he had explained the caution to the appellant, the burden was on the appellant to cross-examine SP9 as to the form and manner of explanation given by him. It is an accepted principle of law that failure by the accused to cross-examine the prosecution witness on a crucial part of the case
D will amount to an acceptance of the witness's testimony. Of course, the position will be different if there is a legal duty to explain the caution. (para 20)

(3) In respect of the previous drug transaction of the appellant
E contained in P27, this extra piece of information supplied by the appellant to SP9 could not have been conjured up by him as he was not an interested person. It was information that the appellant voluntarily supplied when the need did not arise, and merely reflected that the appellant was very co-operative.
F This impugned statement, on the facts, was made in the context of the space required in the car to hide the 48 kilograms of cannabis which entailed the taking out of the spare tyre to provide space for the drugs. It was clear that the trial judge had not been influenced by this evidence in
G arriving at his conclusion. Even if the impugned statement was an improper admission of evidence, there was nevertheless ample evidence to justify the conviction (see s. 167 of the EA). It was the judgment of this court that the prosecution had established beyond reasonable doubt that P27 was
H voluntarily given and, thus, admissible in evidence. (para 22)

(4) Even assuming that P27 was ruled inadmissible, the other available evidence was more than sufficient to sustain the appellant's conviction on the charge framed. On this point, the Court of Appeal had rightly stated in its judgment that even
I without the cautioned statement it was safe to convict the appellant based on the other evidence. The Court of Appeal

had considered and subjected all the evidence adduced by the prosecution to a critical re-examination, and had given sound reasons as to why the evidence was admitted and that it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from witnesses called by the prosecution as appearing in the Appeal Record. Therefore, the Court of Appeal did not err on this issue. *PP v. Abdul Rahman Akif* (foll); *Parlan Dadeh v. PP* (foll). (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, yang rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman mati yang dikenakan ke atasnya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') oleh Mahkamah Tinggi kerana mengedar kanabis telah ditolak, memfail rayuan semasa terhadap keputusan Mahkamah Rayuan. Alasan tunggal yang dihujah oleh perayu ialah bahawa hakim perbicaraan khilaf apabila menerima pernyataan beramaran perayu ('P27'). Perayu mendakwa bahawa terdapat dua kecacatan penting dalam perekodan P27: (i) amaran hanya telah dibaca dan bukan diberi, dari segi bahawa ia tidak dijelaskan bersama-sama dengan akibat-akibatnya. Ia dikatakan bahawa hanya membaca amaran itu sahaja kepada seseorang merupakan sesuatu pelaksanaan mekanikal dan tidak bermaksud bahawa amaran itu telah diberi. Ia lagi dihujah bahawa walaupun beliau telah menjelaskan amaran itu kepada perayu, ia langsung tidak disebut dalam P27. Keterangan lisan SP9 tidak sepatutnya dibenarkan kerana ia jelas merupakan suatu perkara yang difikirkan kemudian dan ia meragukan sama ada SP9 telah sebenarnya menjelaskan amaran itu. Walau apapun, tidak ada apa-apa keterangan mengenai sifat penjelasan yang diberi oleh SP9; dan (ii) P27 mengandungi keterangan sesuatu urusan dadah dahulu yang sangat memprejudiskan yang merupakan keterangan kelakuan jahat dan rujukan dibuat pada s. 54(1) Akta Keterangan 1950 ('AK'). Ia dihujahkan bahawa hakim perbicaraan mungkin telah diprejudiskan dalam mencapai keputusannya untuk menyabit perayu kerana beliau telah menyebut dalam penghakimannya tentang urusan dadah dahulu itu. Ia, oleh itu, dihujah bahawa pernyataan beramaran itu sepatutnya didapati tidak boleh diterima disebabkan kecacatan-kecacatan ini. Oleh kerana sabitan perayu berdasarkan pernyataan beramaran itu, ia sepatutnya menyusul bahawa rayuan dibenarkan dan perayu dibebaskan dan dilepaskan.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Tidak ada keperluan statutori di bawah undang-undang, sama ada Kanun Acara Jenayah ataupun Akta, bahawa amaran yang diberi oleh pegawai merekod kepada orang tertuduh mesti dijelaskan. Keperluan yang sangat penting bagi pernyataan itu dijadikan boleh diterima ialah bahawa ia mesti diberi secara rela dan untuk mencapai dapatan itu, hakim perbicaraan mesti menilaikan semua fakta-fakta dan keadaan di sekitar pemberian pernyataan itu. Dalam kes semasa, oleh kerana perayu dan SP9 merupakan orang Melayu, fakta bahawa amaran itu diberi, dan pernyataan itu direkodkan, dalam Bahasa Malaysia tidak merupakan satu isu. Ia direkodkan dalam P27 bahawa perayu telah menjawab secara afirmatif apabila ditanya sama ada beliau memahani amaran itu dan sama ada beliau masih ingin membuat suatu pernyataan berhubung dengan penangkapannya setelah memahami amaran itu. Perayu juga mengesahkan lagi bahawa beliau tidak menyediakan pernyataan itu di bawah ugutan, janji atau dorongan.

(2) SP9 telah memberi keterangan bahawa beliau telah menjelaskan amaran itu kepada perayu walaupun beliau tidak merekodkan faktor penjelasan dalam pernyataan yang disoalkan. Bahagian ini keterangan SP9 mengenai penjelasan olehnya kepada perayu tidak pernah dicabar di mana-mana peringkat perbicaraan. Isu ini hanya dikemukakan oleh perayu di peringkat rayuan. Oleh kerana SP9 telah menyatakan dalam keterangan bahawa beliau telah menjelaskan amaran itu kepada perayu, beban adalah di atas perayu untuk periksa balas SP9 mengenai bentuk dan cara penjelasan yang diberi olehnya. Ia adalah prinsip undang-undang yang mantap bahawa kegagalan oleh tertuduh untuk periksa balas saksi pendakwaan mengenai bahagian penting kes akan bermakna penerimaan testimoni saksi itu. Tentunya, kedudukan akan berbeza jika ada kewajipan di sisi undang-undang untuk menjelaskan amaran itu.

(3) Berkenaan dengan transaksi dadah dahulu perayu yang dikandungi dalam P27, informasi berlebihan yang disediakan oleh perayu kepada SP9 tidak boleh diwujudkan olehnya kerana beliau bukan seseorang yang berminat. Ia merupakan informasi yang disediakan oleh perayu dengan rela apabila ia tidak perlu, dan hanya menunjukkan bahawa perayu sungguh

bekerjasama. Pernyataan yang disoal itu, atas fakta-fakta, telah dibuat dalam konteks ruang yang diperlukan dalam kereta untuk menyembunyikan 48 kilogram kanabis yang melibatkan pengeluaran tayar ganti untuk menyediakan ruang bagi dadah itu. Ia adalah jelas bahawa hakim perbicaraan tidak dipengaruhi oleh keterangan ini apabila mencapai kesimpulannya. Jikapun pernyataan yang disoal itu merupakan suatu penerimaan keterangan yang tidak patut, terdapat namun begitu keterangan yang amat cukup untuk menjustifikasikan sabitan itu (lihat s. 167 AK). Ia adalah penghakiman mahkamah ini bahawa pendakwaan telah membuktikan melampaui keraguan munasabah bahawa P27 telah diberi dengan rela dan, oleh itu, boleh diterima sebagai keterangan.

(4) Sungguhpun seandainya P27 didapati tidak boleh diterima, keterangan lain yang ada lebih dari mencukupi untuk membenarkan sabitan perayu atas tuduhan yang dikemukakan. Berhubungan perkara ini, Mahkamah Rayuan telah menyatakan dengan betul dalam penghakimannya bahawa walaupun tanpa pernyataan beramaran itu ia adalah selamat untuk menyabit perayu berdasarkan keterangan lain. Mahkamah Rayuan telah menimbangkan dan mengkaji semula dengan teliti semua keterangan yang dikemukakan oleh pendakwaan, dan telah memberikan sebab-sebab yang bagus mengenai kenapa keterangan itu telah diterima dan bahawa ia telah mengimplikasikan perayu. Tidak ada berlaku salah laksana keadilan terhadap perayu sebab keputusan Mahkamah Rayuan berdasarkan keterangan yang dikemukakan oleh saksi-saksi yang dipanggil oleh pendakwaan seperti yang terdapat dalam Rekod Rayuan. Oleh yang demikian, Mahkamah Rayuan tidak khilaf atas isu ini. *PP v. Abdul Rahman Akif* (diikuti); *Parlan Dadeh v. PP* (diikuti).

Case(s) referred to:
Boudreau v. The King [1949] 94 CCC1 (SCC) ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(foll)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(foll)***
PP v. Aidil Ma'rof [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317 HC ***(refd)***
PP v. Kalaiselvan [2001] 1 LNS 24 ***(refd)***
Tan Too Kia v. PP [1980] 2 MLJ 187 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 ***(refd)***
Mohamed Mokhtar v. PP [1971] 1 LNS 84 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(d), 37A(1)
Evidence Act 1950, ss. 8, 9, 54(1), 167

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Saiful Edris Hj Zainuddin DPP

[Appeal from Court of Appeal, Criminal Appeal No: C-05-41-2000]

[Editor's note: For the Court of Appeal judgment, please see Mohd Zaiham Mislan v. PP [2010] 1 CLJ 74.]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] The appellant was charged in the High Court at Kuantan on the following charge:

> Bahawa kamu pada 22hb April, 1999 jam lebih kurang pukul 8.10 malam di dalam sebuah kenderaan No. JCY 3936 bertempat di Kilometer 14, Jalan Pekan/Nenasi, Pekan, di dalam Daerah Pekan, dalam Negeri Pahang Darul Makmur telah didapati mengedar dadah berbahaya iaitu cannabis (ganja) seberat 45,565 gram, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234), dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The learned judge of the High Court found the appellant guilty, convicted him on the charge and sentenced him to death. He appealed to the Court of Appeal against the decision of the High Court. The learned judges of the Court of Appeal dismissed the appeal and affirmed the conviction and sentence in respect of the charge. Being dissatisfied with the decision, the appellant now appeals to this court against the whole decision of the Court of Appeal.

The Case For The Prosecution

[3] The evidence adduced by the prosecution from the relevant prosecution witnesses may be summarized as follows:

[4] On 22 April 1999 at about 8 pm, L/Kpl. Abdul Rahim ("SP8") and L/Kpl. Zainuddin ("SP10") while on patrol duty in a patrol car saw a Proton Wira car bearing registration number JCY

3936 overtaking them at a double line area along the road at 14th kilometer Jalan Pekan/Nenasi, Pekan. Observing that there has been a breach of the Highway Rules by the driver of the car, they gave chase to the said car which was eventually overtaken. It then came to a stop. SP8 then directed the driver to come out of the car and asked him to produce his driving licence. At the same time SP8 informed him of the traffic offence he had just committed. The driver was identified as the appellant.

[5] In the course of the examination of the appellant and the car he was driving SP8 detected the aroma of cannabis from the car. SP8 then asked the appellant whether he had cannabis with him. The appellant pleaded with SP8 not to take any action against him before handing over his driving license. SP8 testified that the appellant looked anxious and worried. SP8 then directed him to open his car boot and the compartment of the spare tyre. Upon opening the boot, SP8 saw slabs wrapped in plastic inside the spare tyre compartment which he suspected to be cannabis. SP8 found the spare tyre of the car in the boot missing. In the boot were also found the Johor edition of the Harian Metro newspaper dated 20 April 1999 and the Utusan Malaysia newspaper dated 21 April 1999. The appellant was arrested and brought to the police station.

[6] ASP Abdul Razak ("SP16") in the course of his investigation discovered that the appellant was in Johore Bahru on 20 April 1999 and had hired the car there. The missing spare tyre of the car was found to have been left at the house of one Mohamad Rashid ("SP5"), a friend of the appellant and the person who had stood as the guarantor for the car hired by the appellant. The appellant had informed SP5 that he had hired the car as he intended to drive up north. SP5 in his evidence stated that he only realized the existence of the spare tyre at his house after returning from work.

[7] Mohd Shariff ("SP1"), the Chemist conducted four tests for the drugs in this case, namely the physical, microscopic, the Dequinine Levine Test ("DLT") and the TLC on the offending slabs and confirmed that they were cannabis weighing 45,565 grams.

[8] The cautioned statement ("exh. P27") of the appellant recorded by ASP Mohd Sakri ("SP9") was admitted as evidence after a trial-within-a trial conducted by the learned trial judge.

A

Findings Of The High Court

[9] The learned judge of the High Court in finding the appellant guilty of the charge had, *inter alia*, made the following findings:

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(a) The cautioned statement P27 was free of any threat, promise or inducement and was admissible. The cautioned statement was given voluntarily.

(b) The Chemist's evidence which had concluded that the plant material were in fact cannabis was credible.

C

(c) The appellant had custody, control and possession of the cannabis.

(d) The appellant was trafficking in the drugs, ie, by direct evidence, as he had intentionally transported and concealed the cannabis in the Proton Wira Car bearing registration number JCY 3936.

D

(e) The defence case was unreasonable, unbelievable and had not raised a reasonable doubt in the case for the prosecution.

E

Findings Of The Court Of Appeal

[10] The Court of Appeal in affirming the decision of the High Court had, *inter alia*, made the following pertinent findings against the appellant:

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> In fact, from the chain of abundant evidence adduced by the prosecution (even without the assistance of the cautioned statement), in particular the preparation prior to the buying of the drugs in the like of having a mode of a transport, readying space for the offending drugs, his anxious behavior when detained, the strong aroma that permeated the air and promptly detected by SP8 and the other police personnel, all pointed to this ingredient having sufficiently proved. With the appellant positively having custody or control not only of the vehicle, but also knowledge of the drugs in the car, the learned judge was perfectly right in finding the prosecution having proved the ingredient of possession independently of section 37(a) of the Act. (See page 22 of the Appeal Record Volume 1).

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H

The Appeal

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[11] Before this court learned counsel for the appellant submitted that the only ground the appellant wishes to argue is that the learned trial judge erred in admitting the cautioned statement (P27)

of the appellant. It is the contention of the appellant that there are two major defects in the recording of P27 which are as follows:

[12] Firstly, it was contended that the caution was merely read and not administered in the sense that it was not explained together with its consequences. In support of his contention learned counsel cited the case of *PP v. Kalaiselvan* [2001] 1 LNS 24 wherein Augustine Paul J (as he then was) in his judgment, *inter alia*, had this to say:

> The explanation of the caution by PW6 deviates from the requirement of the statutory caution in two respects. Firstly, the explanation conveyed to the accused means that if he chose not to make a statement to PW6 then he must make one in court. This makes it obligatory to make a statement and thus dilutes the right of the accused to remain silent which was subsequently communicated to him. Secondly, the explanation of the caution by PW6 to the accused did not refer to the part of the caution which states that there is no obligation to answer any question. The omission of the right of a person not to answer any questions in the administration of a caution will render the statement made inadmissible.

[13] Learned counsel for the appellant submitted that merely reading the caution to a person is a mechanical exercise and does not amount to administering the caution. It was further submitted that although SP9 said in his evidence that he had explained the caution to the appellant, not a word was mentioned in P27 itself about this. It is the contention of learned counsel that the oral evidence of SP9 should not have been admitted. It is a clear afterthought and is very doubtful as to whether SP9 had in fact explained the caution. In any event learned counsel for the appellant submitted that there was no evidence as to what was the nature of the explanation given by SP9.

[14] Secondly, learned counsel for the appellant contended that the cautioned statement P27 contained very prejudicial evidence of a previous drug dealing of the appellant which is evidence of bad character and reference was made to s. 54(1) of the Evidence Act 1950 which reads as follows:

> (1) In criminal proceedings the fact that the accused person has a bad character is irrelevant; unless evidence has been given that he has a good character, in which case it becomes relevant.

[15] In relation to this evidence of bad character of the appellant, it was submitted that the learned trial judge could have been prejudiced in arriving at his decision in convicting the appellant as he had mentioned in his judgment about the previous drug dealing of the appellant as follows:

> Tertuduh juga mengakui pergi ke Tak Bai kali pertama bersama Sam dan diperkenalkan dengan Maggie dan kali keduanya dia pergi sendiri dan membawa balik 45 kilo ganja. Tertuduh tahu keluasan ruang yang diperlu dalam boot JCY 3936 untuk menyimpan 48 kilo ganja yang akan dibelinya dan dibawa pulang dan atas dasar itulah dalam P27 dia mengaku dia buka tayar simpanan untuk simpanan ganja didalamnya.
>
> (See p. 14 of the judgment).

[16] Based on the above mentioned defects in the cautioned statement, learned counsel for the appellant contended that the cautioned statement should be ruled inadmissible. As the conviction of the appellant was based on the cautioned statement it should therefore follow that the appeal be allowed and the appellant acquitted and discharged. With respect I am of the view that such a contention by the appellant is untenable in the circumstances of the case for the following reasons:

[17] It is my considered view there is no statutory requirement under the law, be it under the Criminal Procedure Code or the Dangerous Drugs Act 1952 ("the Act") that the caution administered by the recording officer to the accused person must be explained. The caution as found in s. 37A(1) of the Act states as follows:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

[18] It is clear that the above provision is silent as to whether the caution must be explained to ensure comprehension of it. The only essential requirement for the statement to be made admissible is that it must be voluntarily given and to arrive at that finding the trial judge must assess all the facts and circumstances that surround the giving of the statement. (See the case of *Boudreau v. The King* [1949] 94 CCC1 (SCC)). On the issue of whether there

is a requirement to explain the caution to the accused person, I am of the view it would very much depend on the facts and circumstances of each case. (See the case of *PP v. Aidil Ma'rof* [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317). It would be most appropriate for example when an accused person has a poor command of the language adverted to under the caution administered that an explanation must be provided for to ensure adequacy of protection for him.

[19] On the facts of this case I do not think SP9 is required to explain the caution to the appellant after it was administered. The caution was administered in the Malay language as the appellant is a Malay person. There was no necessity to provide an interpreter. In the case of *Tan Too Kia v. PP* [1980] 1 LNS 77 the Federal Court had occasion to remark, *inter alia*, as follows:

> … we would observe that generally speaking it is desirable that a suspect be interrogated in a language in which he is at home …

In the present case since the appellant is a Malay and the recording officer SP9 is also a Malay, it is my view that the factor of language in administering the caution and the recording of the statement in the Malay language is a non-issue. It is to be noted that in P27 it is recorded that the appellant had answered in the affirmative when asked whether he understood the caution. He was also asked whether he still wanted to make a statement pertaining to the arrest since he understood the caution. His answer remained in the affirmative. He also reaffirmed that the statement he was supplying was not given under threat, promise or inducement.

[20] SP9 had testified that he had explained the caution to the appellant although he had not recorded the explanation factor in the impugned statement. This part of the evidence of SP9 about him explaining the caution to the appellant was never challenged at any stage of the trial. This issue was only taken up by learned counsel for the appellant at the appellate stage. It is my view that as SP9 had stated in evidence that he had explained the caution to the appellant the burden is on the appellant to cross-examine SP9 as to the form and manner of explanation given by him. On this point I would like to state here that it is an accepted principle of law that failure by the accused to cross-examine the prosecution witness on a crucial part of the case will amount to

A an acceptance of the witness's testimony. (See the case of *Wong Swee Chin v. PP* [1980] 1 LNS 138). Of course the position will be different if there is a legal duty to explain the caution.

[21] As regards the case of *PP v. Kalaiselvan (supra)* cited by
B learned counsel for the appellant to support his contention of the need for the caution to be explained together with its consequences, I find nowhere in the judgment of the learned judge that he had stated there is such a requirement to be complied with. In the said case there was in fact an explanation
C of the caution made by the recording officer to the accused person. The learned judge in his judgment was merely addressing himself on the form and manner in which the explanation of the caution was made to the accused person. He then came to a conclusion that as the caution was not properly and adequately
D explained the statement made was inadmissible. The learned judge had rightly stated in his judgment on this issue of whether there is a need to explain the caution or not as follows:

> A determination of this issue will, of course, depend on the
E circumstances of each case … Where, however, the caution has been explained, it is my view that the explanation offered must not deviate from the language and spirit of the caution as prescribed by law. It follows that a caution read out in its regular form but subsequently explained in an irregular manner will lose its value as a properly administered caution.

F **[22]** I shall now deal with the second argument raised by the appellant regarding the cautioned statement to the effect that it had included a previous drug transaction of the appellant and had hence affected its admissibility. On this issue I am in agreement
G with the finding of the Court of Appeal that this extra piece of information supplied by the appellant to the recording officer could not have been conjured by him as he was not an interested person. It was an information which was voluntarily supplied by the appellant when the need did not arise. This merely goes to
H show that the appellant was very co-operative and the statement given in the course of the recording session was voluntary. On this impugned statement it is noted that it was made in the context of the space required in the car to hide the 48 kilos of cannabis which entailed the taking out of the spare tyre so as to provide a
I space for the drugs. I do not find that the learned trial judge had been influenced or had been clouded in arriving at his conclusion

by this evidence. It is my considered view that even if the impugned statement was an improper admission of evidence, nevertheless there was ample evidence to justify the conviction. (See s. 167 of the Evidence Act 1950). It is my judgment that the prosecution has established beyond reasonable doubt that the cautioned statement (P27) was voluntarily given, and thus admissible in evidence.

[23] Even assuming that the cautioned statement (P27) is ruled inadmissible, I am of the view that the other available evidence is more than sufficient to sustain the conviction of the appellant on the charge framed. On this point, the Court of Appeal had rightly stated in its judgment that even without the cautioned statement it was safe to commit the appellant based on the other evidence. It must be noted that in a case involving purely a question of fact the Court of Appeal is free to determine whether or not the various findings of the trial court are correct. (See the case of *Mohamed Mokhtar v. Public Prosecutor* [1971] 1 LNS 84). The Court of Appeal had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and that it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal record. I am therefore of the view that the Court of Appeal did not err on this issue.

[24] I would hasten to state here that on the evidence of custody, control, knowledge and possession of the drugs by the appellant, the prosecution has succeeded in proving these essential ingredients by the following evidence:

(i) he was the driver of the car and alone at the time of the arrest;

(ii) the car was with him two days prior to his arrest;

(iii) the drugs were recovered from the compartment of the spare tyre inside the boot of the car and the spare tyre was found missing.

(iv) he felt uneasy, scared and nervous when SP8 asked him to open his car boot;

A (v) the strong aroma that permeated the air coming from the appellant's car promptly detected by SP8 and the other police personnel;

(vi) he pleaded twice to SP8 not to take action against him when
B asked whether he had ganja in his car; and

(vii) his conduct in trying to escape and struggle before he was apprehended by SP10.

[25] The only conclusion that can be made on the evidence
C adduced is that the appellant was in absolute control of the car and master of everything in it. On this point in the case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 the Federal Court, *inter alia*, held that:

D The incontrovertible facts as found by the trial judge was that the three packages were found in the car driven by the respondent, that the respondent was the only person in the car at the material time, that one package was found under the driver's seat and two packages under the passenger's seat and that the car was in the possession of the respondent for more than seven months prior
E to his arrest. Under the circumstances, the trial judge was right in holding that at the material time the packages were in the custody and control of the respondent. The irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they
F were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly
G directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drug independent of the statutory presumption under section 37(d) of the Act.

[26] In *Parlan bin Dadeh v. PP* [2009] 1 CLJ 717 the Federal
H Court explained the connection between the conduct and knowledge of an accused person in relation to the offending exhibits found in his possession and the need for him to offer an explanation as follows:

I The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under section 8 of the Evidence Act 1950 ("the Act") since it has a direct bearing on the fact in issue as the drugs found were tucked

away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by section 9 of the Act. However, as the appellant did not offer any explanation for his reaction upon being approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that he knew what he was carrying.

[27] Likewise, in the present case I am of the view that the appeal made by the appellant to SP8 not to take action against him after he was asked whether he had ganja in his car and his conduct of being uneasy, scared and nervous when SP8 asked him to open his car boot are relevant and admissible under s. 8 of the Evidence Act. There is also a connection between the act of pleading to SP8 by the appellant and the smell of ganja and subsequently the finding of the ganja in the appellant's car. The appellant must therefore explain his conduct as required by the provision of s. 9 of the Evidence Act. The appellant has failed to do so in this case. Therefore the inference to be drawn from the evidence was that the appellant knew what he was carrying. Based on the evidence adduced by the prosecution it can safely be concluded that the appellant had *mens rea* possession of the drugs in the car independent of the statutory presumption under s. 37(d) of the Act.

Conclusion

[28] For the reasons above stated I would dismiss the appellant's appeal. The conviction recorded and the sentence passed by the High Court and affirmed by the Court of Appeal are hereby affirmed.

[29] My learned brothers Augustine Paul, FCJ and Mohd Ghazali bin Mohd Yusoff, FCJ, have seen this judgment in draft and have expressed their concurrence.